IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 337 OF 2005

Allan Rebellow. ... Appellant.

Versus.

Municipal Corporation of
Gr.Mumbai and others. ... Respondents.

Shri G.S.Godbole for the Appellant.

Ms.Geeta Joglekar for the Respondents.

CORAM : ABHAY S. OKA, J.

DATED : 28th March, 2005.

P.C.:

1. Heard the learned Counsel appearing for the parties. Shri Godbole has invited my attention to the primafacie finding recorded by the learned trial Judge in paragraph 5 of the impugned Judgment and Order which reads as under:

> "The learned Counsel for the Plaintiff Mr.Gandhy has brought two judgments before this Court. One is unreported in Notice of Motion No.1642 of 1997 in Suit No.5111/1994 dated 17.12.1998. It is being seen on this issue that "the sanction has been given to the building plan has been granted by the Planning Authority. The jurisdiction of the Civil Courts to secure into the validity of an order of the Planning Authority sanctioning building

plan is ousted because of the provisions of the M.R.T.P.Act The building is being constructed according to the sanctioned plan. There is no room to grant any injunction. Notice of Motion is disposed of". The second Judgment appeared in A.I.R. 1993 of Bombay High Court, page 151 M/s.Vora Automotives Pvt.Ltd. v/s. Gopalrao Namdeorao Pohre and others, in the head note, it is specifically seen Civil P.C. (5 of 1908), Section 9 - Jurisdiction of Civil Court - Suit for injunction restraining a person to construct building as per plan - Adequate remedy provided to any person interested under scheme of Act - jurisdiction of Civil Court ousted by necessary implication", passed by Hon'ble Justice Shri A.A.Desai."

Shri Godbole has placed reliance on the decision of the Division Bench of this Court reported in AIR 2000, Bombay, page 444 (Smt.Fatima Joao v/s. Village Panchayat of Merces and anr.). He submitted that in view of the decision of the Division Bench, the law laid down by the learned single Judge of this Court in the case of M/s.Vora Automotives Pvt.Ltd. which is referred to by the learned trial Judge is no longer a good law and the suit filed by the Appellant was maintainable.

2. It is necessary to refer to the relevant part of the decision of the Division Bench of this Court. Paragraph 33 of the said decision reads thus:

> "33. Independently of the discussion, is it possible to hold that the Civil Court would have jurisdiction. Under section 9, jurisdiction of the Civil Court to entertain all civil disputes, can be taken away by excluding its civil jurisdiction. Goa Panchayat Raj Act, 1993 has no provision excluding the jurisdiction of the Civil Court. Earlier it has been discussed that there is also no implied ouster. Under section 38 of the Specific Relief Act, a perpetual injunction can be granted to prevent the breach of an obligation existing in favour of a party whether expressly or by implication. "Obligation" has been defined to mean every duty enforceable by law. What therefore, is the duty which is enforceable against a neighbour who violates the provisions of the Goa Panchayat Raj Act, 1993. Will putting up a construction without taking a licence or by taking a licence and constructing contrary to the licence, give to the neighbour a right. Does the person constructing owe a duty to the neighbour not to construct without a licence or contrary to the licence ? Can this be said to be a right

enforceable in a Civil Court? Easements, in so far as light and air, are concerned in areas falling within the jurisdiction of local bodies are subject to the Acts, Rules and Regulations of such bodies. This is pursuant to the powers conferred on local bodies by various statutes to regulate construction activities within their jurisdiction. Therefore, does this duty cast by the statute on the neighbour, create an obligation which would be enforceable in a Civil Court. If it can be spelt out from the act itself, then the Civil Court would have jurisdiction. In respect of construction contrary to licence, extraordinary jurisdiction of this Court can be invoked to direct the local body to enforce the provisions of the acts, rules and regulations. If, therefore, the extraordinary jurisdiction available, a civil suit would be maintainable to direct by way of mandatory injunction, the local authority to discharge its duties under the Act. Where therefore, a local body is a party, there is no difficulty whatsoever."

3. In view of what is said by the Division Bench, prima-facie there is a substance in the said submission of Shri Godbole. It is pertinent to note that the observations made by the learned trial Judge on the

issue regarding jurisdiction and maintainability of the suit are only primafacie observations. It is also pertinent to note that no issue as regards the jurisdiction was framed by the learned trial Judge. Thus as and when the issue of jurisdiction is framed in the suit, it is obvious that the same will be decided by the learned trial Judge on its own merits without being influenced by the said primafacie observations.

4. Shri Godbole fairly stated that the construction which is being carried out the Respondent No.2 is substantially complete. The order impugned has been passed on 23rd July 2004 and from that day there was no interim relief operating in favour of the Appellant for preventing further construction by the Respondent No.2. Shri Godbole has invited my attention to the prayer made in the Civil Application. One of the prayers is for restraining the Respondent No.2 from creating any third party interests. I find that such a prayer was not made in the Notice of Motion taken out in the trial Court and therefore, considering the scope of this Appeal which arises out of an order passed in the Notice of Motion, the said prayer cannot be considered in this Appeal.

5. As the substantial construction by the Respondent No.2 is already completed and as the impugned order is operating for quite sometime, the Appeal is not entertained and the same is dismissed. It is obvious

that the findings which are recorded by the learned trial Judge are only tentative findings and all further proceedings in the suit will be decided by the learned trial Judge on its own merits without being influenced by the said tentative findings. The dismissal of the Appeal will not preclude the Appellant from taking out appropriate application for appropriate relief in the trial Court.

6. At this stage Shri Godbole submitted that the Respondent No.1-Corporation be restrained from granting occupation/completion certificate in respect of the suit structure. However, I find that the said prayer was not made in the Notice of Motion No.865 of 2004 and therefore, it is for the Appellant to take out appropriate proceedings in that behalf.

Judge.